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11 U.S.C. 1330(a)
revoke confirmation
res judicata

Bright et. al v. Ritacco (In Re Ritacco) Adv. # 96-6204-aer
Main Case # 695-64935-aer13
6/18/97 AER Published

Creditors sought revocation of the order confirming Debtor's Chapter 13 plan. Creditors admitted they had knowledge of the alleged fraud underlying their claim in time to object to confirmation of the plan but did not do so.
Holding: Creditors' action under § 1330(a) is barred by the doctrine of res judicata. To hold otherwise would offend the finality of confirmation orders as expressed in § 1327(a).

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case No.
)	695-64935-aer13
JAMES ANTHONY RITACCO,)	
)	
Debtor.)	
ESTATE OF SUE BRIGHT, SHIRLEY (NO)	Adversary Proceeding
LAST NAME), MERLE & LAVONNE)	No. 96-6204-aer
SCHAFF)	
and the PARKER FAMILY EDUCATIONAL)	
TRUST,)	
)	
Plaintiffs,)	
)	
v.)	
)	MEMORANDUM OPINION
JAMES ANTHONY RITACCO,)	
)	
Defendant.)	

BACKGROUND

This adversary proceeding has been brought by the plaintiffs seeking to revoke the order confirming defendant's Chapter 13 plan pursuant to 11 U.S.C. § 1330(a).

The defendant filed his petition for relief under Chapter 13 of the Bankruptcy Code on December 13, 1995. His Chapter 13 plan

1 filed the same date, was confirmed by an order entered herein on
2 February 22, 1996, without objection.

3 The plaintiffs, along with numerous other unsecured
4 creditors, were scheduled by the defendant as holding claims which
5 were contingent, unliquidated and disputed, having a value of -0-.
6 Plaintiffs allege that confirmation of the debtor's plan was
7 procured by fraud in that the defendant was well aware that the
8 plaintiffs, and many of the other creditors listed on Schedule F,
9 had claims that were non-contingent and liquidated, rendering the
10 defendant ineligible to be a Chapter 13 debtor pursuant to
11 11 U.S.C. § 109(e)¹. The plaintiffs maintain that the non-
12 contingent, liquidated unsecured claims exceeded \$250,000 on the
13 date the Chapter 13 petition was filed. They further allege that
14 the defendant fraudulently prepared and filed his Schedule F forms,
15 thereby practicing a fraud upon this court and his creditors in
16 gaining confirmation of a Chapter 13 plan.

17 On February 29, 1996, plaintiffs filed a motion to dismiss or
18 convert this case based upon the debtor's ineligibility. This
19 motion was denied pursuant to an order entered on June 21, 1996,
20 this court having concluded that the confirmation of the Chapter 13
21 plan was res judicata on the issue of the defendant's eligibility
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25 ¹Section 109(e) provides in pertinent part: "Only an individual with regular
26 income that owes, on the date of the filing of the petition, non-contingent,
liquidated, unsecured debts of less than \$250,000. . . may be a debtor under
Chapter 13 of this Title."

1 See 11 U.S.C. § 1327(a).² See also In re Jarvis, 78 B.R. 288
2 (Bankr. D. Or. 1987).

3 Plaintiffs then filed their complaint herein on August 16,
4 1996 and an amended complaint on August 20, 1996 seeking revocation
5 of the Order of Confirmation pursuant to 11 U.S.C. § 1330(a).

6 The parties filed cross motions for summary judgment which
7 were argued before this court on March 4, 1997. At that hearing,
8 this court agreed with the plaintiffs and found that their debts
9 were indeed non-contingent and liquidated. This court further
10 found, however, that a material issue of fact existed as to whether
11 or not the defendant had fraudulently prepared his schedules (in
12 short, the defendant's intent). Accordingly, an order was entered
13 denying plaintiff's motion for summary judgment on March 18, 1997.

14 At the hearing on the cross motions for summary judgment,
15 this court raised an issue concerning the defendant's motion. This
16 court inquired as to whether or not the plaintiffs could maintain
17 this adversary proceeding when they had knowledge of the facts
18 constituting the alleged fraud in time to have objected to
19 confirmation of the defendant's Chapter 13 plan or to have taken
20 other appropriate action, such as a pre-confirmation motion to
21 dismiss. This court invited the parties to submit further briefs
22 concerning this particular issue and stated that the defendant's
23

24 ²Section 1327(a) provides:

25 The provisions of a confirmed plan bind the debtor and each
26 creditor, whether or not the claim of such creditor is provided for by
the plan, and whether or not such creditor has objected to, has
accepted, or has rejected the plan.

1 motion for summary judgment would be granted if the court concluded
2 that the plaintiffs' action is barred, otherwise, that motion would
3 likewise be denied and this matter would be set for trial. The
4 parties have taken advantage of the court's invitation to submit
5 supplemental briefs and this matter is ripe for decision.

6 **ISSUE**

7 The sole question to be decided is whether or not a creditor
8 may maintain an action under 11 U.S.C. § 1330(a) when the creditor
9 knew of the alleged fraud in time to have objected to confirmation
10 of the debtor's plan.

11 **DISCUSSION³**

12 This appears to be a case of first impression in this
13 district.⁴ The plaintiffs concede that they were duly scheduled and
14 notified about the defendant's Chapter 13 bankruptcy. They offer no
15 contention that they were not adequately apprised of the status of
16 the case, in short, no notice or due process concerns are presented.
17 In addition, it is apparent from a review of the plaintiffs'

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19 ³All statutory references are to the Bankruptcy Code, Title 11 United States
20 Code, unless otherwise indicated.

21 ⁴There also does not appear to be any decisions regarding this issue with
22 regards to § 1330(a)'s sister statutes, § 1144 and § 1230(a).

23 § 1144 provides in pertinent part:

24 On request of a party in interest at any time before 180 days after
25 the date of the entry of an order of confirmation, and after notice
26 and a hearing, the court may revoke such order if, and only if, such
order was procured by fraud.

§ 1230(a) is identical to § 1330(a) except that the reference to § 1325 is
to §1225.

1 pleadings and other submissions that they were well aware of the
2 facts giving rise to the allegations of fraud well before the entry
3 of the Order of Confirmation. It is the plaintiffs' position,
4 however, that such prior notice and knowledge are not impediments to
5 their action under § 1330(a).

6 Section 1330(a) provides:

7 On request of a party in interest at any time
8 within 180 days after the date of the entry of an
9 order of confirmation under section 1325 of this
title, and after notice and a hearing, the court may
revoke such order if such order was procured by fraud.

10 In general, confirmation of a plan is res judicata, as to all
11 justiciable issues which were or could have been decided at the
12 confirmation hearing. In re Ivory, 70 F.3d 73 (9th Cir. 1995).⁵
13 Applying res judicata to confirmation orders enforces the doctrine
14 of finality as expressed in §1327(a).⁶ See In re Lochamy, 197 BR.
15 384 (Bank. N.D. Ga. 1995) and In re Evans, 30 BR. 530 (9th Cir. BAP
16 1983).

17 There are, however, exceptions to the res judicata doctrine
18 surrounding the confirmation of Chapter 13 plans. See In re Powers,

22 ⁵ Of course Debtor's good faith is always an issue before the court at
23 confirmation. Furthermore, §1330(a) itself assumes that confirmation would have
24 been denied had the court been aware of the fraud, implying that there could have
been no requisite finding of good faith.

25 ⁶ In fact, as noted above, this doctrine has already been applied in this
26 case in denying Plaintiff's post confirmation motion to dismiss based on lack of
eligibility.

1 202 B.R. 618 (9th Cir. BAP 1996) where the Bankruptcy Appellate
2 Panel dealt with the interplay between §§ 1329 and 1327.⁷

3 In addition, plaintiffs rely upon several well recognized
4 rules of statutory construction to support their position. They
5 note that § 1330(a) does not specifically require a lack of prior
6 knowledge on the part of a party seeking revocation. Plaintiffs
7 maintain that the court must give effect to the plain meaning of the
8 statute, see United States v. Gomez-Rodriguez, 96 F.3d 1262 (9th
9 Cir. 1996). This argument is strengthened by a comparison to the
10 language found in § 1328(e) concerning the revocation of a Chapter
11 13 discharge. That statute provides:

12 (e) On request of a party in interest before one year
13 after a discharge under this section is granted, and
after notice and a hearing, the court may revoke such
discharge only if—

- 14 (1) such discharge was obtained by the debtor
through fraud; and
15 (2) the requesting party did not know of such
fraud until after such discharge was granted.
16

17 [W]here Congress includes particular language in one
18 section of a statute but omits it in another section
of the same Act, it is generally presumed that
19 Congress acts intentionally and purposely in the
disparate inclusion or exclusion.

20 ⁷Section 1329(a) provides in part:

21 At any time after confirmation of the plan but before the
22 completion of payments under such plan, the plan may be modified, upon
request of the debtor, the trustee, or the holder of an allowed
23 unsecured claim, . . .

24 It is noteworthy, that in this district, it appears that a § 1329 plan
modification requires a showing of a substantial change in the debtor's ability to
25 pay since the confirmation hearing and that the prospect of such change had not
already been taken into account at the time of confirmation. See Anderson v.
26 Satterlee, In re Anderson, 21 F.3d 355 (9th Cir. 1994), In Re Suratt, Case # 95-
6183-HO (D. Or. Jan. 10, 1996) (unpublished) (Hogan, J.).

1 Hyatt v. Northrop Corporation, 91 F3d. 1211, 1215 (9th Cir. 1996).

2 Further, the court notes that the predecessor of § 1330(a)
3 contained a knowledge requirement.⁸

4 By enacting a different statute, it is presumed the
5 legislature intended a change in the existing law.

6 In re Lyons v. Ray, (In re Ray), 26 B.R. 534, 543 (Bankr. D. Kan.
7 1983), rev'd on other grounds 804 F.2d 577 (10th Cir. 1986).

8 Although the plaintiffs' arguments have some merit, at least
9 one court has squarely considered the issue presented to the court
10 here. See In re Kouterick, 161 BR. 755 (Bank. D. N.J. 1993). The
11 Kouterick court concluded:

12 Where a creditor knows of a basis for challenging
13 confirmation and fails to object, the creditor cannot
14 be permitted to use that basis to claim fraud under
15 Code §1330 after confirmation. 161 B.R. at 760.

16 In interpreting § 1144, the court in In re TENN-FLA Partners,
17 170 B.R. 946 (Bankr. W.D. Tenn. 1994) noted that "[T]he Congress has
18 specified revocation of a confirmation order as a remedy
19 when, . . . evidence of the plan proponent's fraud becomes apparent
20 within the 180 days following entry of the confirmation order." 170
21 B.R. at 964.

22 Although the matter before the court in In re Jarvis, 78 B.R.
23 288 (Bankr. D. Or. 1987) was a motion to dismiss and not an
24 adversary proceeding under § 1330(a), Judge Hess concluded:

25 ⁸Former 11 U.S.C. § 671 provided in part:

26 If, upon the application of parties in interest filed at any time
within six months after a plan has been confirmed, it shall be made to
appear that fraud was practiced in the procuring of such plan and that
knowledge of such fraud has come to the petitioners since the
confirmation of such plan-. . . (emphasis added)

1 Since the objection to the debtor's eligibility was
2 not raised prior to confirmation of the debtor's plan,
3 the order confirming the plan constitutes a binding
4 determination of the debtor's eligibility, and is not
5 now subject to collateral attack.
6 78 B.R. at 289.

7 This court finds the rationale set forth in Jarvis and
8 Kouterick to be persuasive. Clearly, the Congressional purpose
9 behind the enactment of § 1330(a) was to allow a party in interest
10 to seek revocation of an order confirming a Chapter 13 plan where
11 the debtor had procured such confirmation through fraud and the
12 fraud is discovered or becomes apparent, to the parties seeking
13 revocation, after confirmation but within the grace period allowed
14 by the statute. Adopting the plaintiffs' arguments would lead to
15 the illogical conclusion that Congress intended that creditors could
16 lay in the weeds and wait to see if a debtor's Chapter 13 plan could
17 gain confirmation. If an order of confirmation is entered they
18 could then bring their § 1330(a) proceeding seeking revocation of
19 such an order. If a party in interest has reason to believe that a
20 debtor is seeking confirmation of a Chapter 13 plan through fraud
21 prior to confirmation, the creditor should bring its objection prior
22 to the confirmation of the plan. Any other result does harm to the
23 finality normally accorded confirmation orders and specifically
24 provided for by Congress in § 1327(a).

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CONCLUSION

Based upon the foregoing, this court concludes that the plaintiffs' action under § 1330(a) is barred by res judicata. Accordingly, it follows that the defendant's motion for summary judgment should be granted, an order consistent herewith shall be entered. This opinion contains the courts findings of fact and conclusions of law; they shall not be separately stated.

ALBERT E. RADCLIFFE
Bankruptcy Judge